HR-83-014-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Irene Gomez-Bethke, Commissioner Department of Human Rights,

Cbmplainant,

VS.

Farmers Union Central Exchange, Inc. ,

Respondent.

FINDINGS OF FACT,

CONCLUSIONS OF LAW

AND ORDER

The above-entitled matter cane (xi for hearing before Jon L. Lunde, duly appointed Hearing Examiner, commencing at 9:00 a.m. on Tuesday, August 2, 1963, at the Office of Administrative Hearings, Courtroom 13, in Minneapolis, Minnesota, pursuant to a Notice and Order for Hearing dated March 15, 1983.

Alan J. Harris, Special Assistant Attorney General, 1100 Bremer tower, Seventh Place and Minnesota Street, Saint Paul, Minnesota 55101, appeared on behalf of the Complainant. Lisa M. Hurwitz, Attorney, Doherty, Rumble & Butler, 3750 IDS Tower, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent . The record closed on Tuesday, August 2, 1983, at the con-clusion of the hearing.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2 (1982), this Order is the final

decision in this case and under Minn. Stat. sec. 363.072 (1982), the Commissioner of the Department ' of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69 (1982).

STATEMENT OF ISSUE

Ube issue in this case is whether or not the Respondent discriminated against its Employee, Charles Richardson (the Charging Party), on the basis of his race by, discharging him but not discharging other employees not of his race for acts of comparable seriousness, contrary to Minn. Stat. 363.03, subd 1(2)(b) (1977 supp.); and if so, the relief, if any, that should be awarded to the Charging Party.

Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Respondent 'has a fenced, nine-acre warehouse facility in Inver Grove Heights, Minnesota which serves as a distribution center for its opera-tions. The Charging Party, Charles Richardson, is a warehouseman at this facility. Be has been employed in that capacity there since October 17, 1974, but is currently on layoff status.

2. At all times material to this action, Richardson was a union member

working on the 3:30 p.m. to midnight shift with approximately 25 other ware-

'house employees employed lo, the Respondent. On Friday, August 26, 1977, he

was one of three black union employees working the second shift, although one

of them had left work early that evening, leaving Richardson and Daryll

Snell. His immediate supervisor was Ralph C. Sanders, a black man who was the
night shift supervisor. Sanders had held that position since October, 1976.

Sanders reported to les Krech, superintendent, who in turn reported to Ike

Halliwill, the facility manager. Both Exech and Halliwill are white men.
3. Ten to 15 minutes prior to the end of his shift on August 26, 1977,
Richardson left work. He did not seek or obtain authorization for his early

departure or punch out on the time clock. Employees were required to punch

their time cards on a time clock located outside the shipping office when

leaving work or when going to or returning from lunch break. They were also

required to obtain supervisory approval before leaving work.

4. As Richardson walked past the guard shack at the outside gate in the

perimeter fence Sanders saw him from a window in the front office of the ware-

house. Sanders was puzzled by Richardson's presence It the gate and went to

see if Richardson had punched out. Richardson's time card was not punched
out. Sanders thought he might return and looked for him in the warehouse.

When he could not find 'him, Sanders called the gate guard who advised him that

a black male had left through the guard shack and had driven off. Sanders

then stationed himself by the time clock as employees punched out at mid-

night - He wanted to find out if Richardson would return to punch out at the
end of Ids scheduled shift. Richardson was not among those employees who

punched out at midnight, hit after all employees had punched out, Sanders

noticed that Richardson's time card had been punched out at midnight. Sanders

did not see who punched Richardson's time card. Since no time cards were not

punched out, Sanders concluded that Richardsons card was not punched in

error, but by request or prearrangement.

5. On auguust 30, 1977, Sanders, Krech and Halliwill met with Richardson

to discuss his early departure on the 26th and the punching of his time card

at midnight. Richardson admitted leaving early without punching out and with-

out supervisory approval, explaining that he had to go to the bank. When

asked if he had someone else punch his time card for 'him, he laughed and made

no comment.

6. After the meeting (xi August 30, Halliwill, who began his employment

with the Respondent on June 13, 1977, asked for Sanders' recommendation. On

September 1, 1977, Sanders wrote a report recommending as follows:

> After reviewing this case, it is my position and the position of my immediate supervisor, Les Krech, that Charles Richardson should be terminated effective September 1, 1977.

Based on this recommendation and his review of Richarlson's personnel record,

Halliwill discharges Richardson effective September 1, 1977. Richardson

grieved his discharge pursuant to the provisions of a collective bargaining

agreement then in effect, and after an arbitration hearing held on November 4,

1977, he was reinstated to his former position with partial backpay. The

arbitrator determined that the Respondent did not have just cause for

Richardson's discharge as a result of the August 26, 1977 incident.

7 . During the first year of his employment, Richardson's absenteeism caused some problems at work, and he was reprimanded on one or two different occcasions. During that time, he was absent twice without notice. He received a verbal warning after the first such absence in December of 1974. In February, 1975, as a result of a dispute with his then supervisor, Martin Thompson, Richardson was unable to work for several days. There is some question whether Richardson was discharged at that time co suspended, but Richardson was ultimately paid for those days when he did not work. lb was off work at that time due to his refusal to work outside during a snowstorm. A more senior white employee who had also refused to work outside was not disciplined and other employees were available with less seniority than Richardson who could have been assigned to do the job. On one occasion in February, 1975, Richardson left work two hours early to assist his girlfriend whose car was stalled, although he was instructed not to leave. At a meeting with his supervisors an April 18, 1975, he was asked to improve his attendance. No warnings were issued to him at that time and the extent of his absenteeism, except as mentioned, is not known. Generally, however, there is no evidence that he was tardy or absent from work after that time except on two occasions.

B. On September 12, 1975, Richardson, along with at least 11 other employees, left work early when advised that they were being laid off at the end of their shift. Employees led routinely left work in this manner in the past, but Richardson and all the other employees who left work prior to the expiration of their shift that day received a reprimand.

9. (Ai October 25, 1976, Richardson and four other employees failed to report for mandatory overtime work. On that occasion, Richardson was suspended for three days and the suspension was upheld in subsequent arbitration proceedings. Between October 25, 1976 and August 26, 1977, Richarson's work record was nearly spotless. He did receive one reminder that

during a three-hour period on February 24, 1977, he was not working at an acceptable speed. . This was not a formal warning for purposes of tne collective bargaining agreement and was not a serious matter.

10. di tne summer of 1977, the Respondent's supervisory personnel perceived that there was a problem with employees who left the premises during their 10-minute break periods and did not return on time and with employees Who extended their 30-minute lunch breaks. Halliwill decided that he would no longer permit employees to leave the distribution center during their breaks without ex-press supervisory approval and that all employees would lave to punch in and cut when going to and returning from 'lunch. On August 12, Sanders held a meeting with his crew and explained the new policies applicable to breaks and lunch periods. Before this meeting, employees were permitted to leave the premises during their breaks and they frequently came back late. Some of these employees were reprimanded but none of them had been suspended or fired.

1I. Prior to Richarlson's discharge, no employees had ever been suspected of leaving work early and having another employee punch out for them, and no one had ever been suspended or discharged for such an offense. However, in past winters tnere were times when, prior to the close of the midnight shift,

one employee would leave work early to start cars for the other employees. The individual who started the cars would be punched out by another individual. This practice was condoned by Sanders during the first winter of his employment (1976-77) but he subsequently stopped that practice.

12. On February 5, 1977, a white employee, Clayton Victorson, left work five hours prior to the end of his shift- without notice to his supervisor. At that time, Sanders was Victorson's supervisor. Victorson normally worked on a different crew. Victorson reported to Sanders that he was in such discomfort that he had no thought of obtaining approval before leaving and that he headed straight for the time clock to punch out and go home. Sanders did not recommend disciplinary action in this case. Ft left that decision to Victorson's usual supervisor, Walter Kessler, who issued Victorson a warning letter.

13. During the seven to ten-day period prior to his discharge, Richardson had threatened or actually filed three grievances with his union concerning the Respondent's practices. One of the grievances pertained to Sanders' failure to offer over-time work to Richardson prior to offering such work to employees with less seniority, contrary to the terms of the existing collective bargaining agreement. Althougn he did not work the overtime involved, Richardson was ultimately paid for the time 'he would have worked had 'he been called in order of his seniority. Sanders had skipped over approximately 10 employees on the seniority list at the time of that incident. most of those employees were white men. Sanders did not offer overtime work to Richardson because he was in a hurry to find someone to work that particular night and he did not think that Richardson would accept overtime work because he had frequently refused it in the past.

Richardson had also threatened to file a grievance when Halliwill decided to transfer three seasonal employees to the day shift. Richardson felt that any transfers to a different shift would 'nave to be in order of seniority and that he should be offered such a transfer first because he had more seniority than the seasonal employees involved. Halliwill decided not to transfer the

employees.

Richardson was also involved in a dispute concerning the calculation of his vacation pay during that period of time. Ft ultimately prevailed and received the vacation adjustments he demanded.

14. The identity of the employee that punched Richardson's time card is unknown and no employee but Richardson was disciplind -as a result of the August 26 incident. Sanders suspected three employees. none of them were black.

15. after his discharge, Richardson filed a timely and proper charge of discrimination against the Respondent with the Department of human Rights. The Commissioner of the Department subsequently found probable cause to believe that he had been discriminated against on the @sis of his race when discharged for his departure on August 26, 1977, and subsequent efforts to conciliate his charge were unsuccessful. The Camplainant's Cbmplaint was served on March 16, 1983 and tne Respondent's Answer was served on April 5, 1983.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. That the Complainant gave proper notice of the hearing in this matter and 'has fulfilled all relevant substantive and procedural requirements of law and rule.

2. That the Hearing Examiner has jurisdiction herein and authority to order the relief granted pursuant to Minn. Stat. sec. 363.071, subd. 2 (1976), as amended, and 14.50 (1982).

3. That the Respondent is an employer as defined in Minn. Stat. 363.01, subd. 15 (1976).

4. 'Mat the Complainant failed to establish a prima facie showing that the Charging Party was discharged from his employment on August 26, 1977, because of his race.

5. 'Mat the Charging Party was discharged from his employment on August 26, 1977, because the Respondent genuinely believed he had left work early and arranged for another employee to pundh his time card at the end of his regularly scheduled shift.

6. That the Employer articulated at legitimate nondiscriminatory reason for its decision to discharge the Charging Party.

7. That the Respondent has failed to establish that the Charging Party was discharged on the basis of his race, contrary to Minn. Stat. 363.03, subd. 1(2)(b) by a fair preponderance of the evidence.

Based upon the foregoing Conclusions of Law and for the reasons set forth in the attached Memorandum:

IT IS ORDERED: That the Cbmplainant's Complaint be and the same is hereby dismissed.

Dated: August 17, 1983.

JON L. LONDE
Hearing Examiner

Reported: Taped

MEMORANDUM

The Cbmplaint charges the Respondent with at violation of minn" Stat.

363.03, subd. 1(2)(b) (1977 Supp.), averring that the Respondent discharged

Charles Richardson because of his race and that Richardson is, therefore,

entitled to damages. At the time of the incidents involved in this matter,

Section 363.03 provided, in part, as follows:

> Subdivision ". Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> (2) Fbr an employer, because of race

(b) To discharge an employee

The provisions of the Minnesota Human Rights Pet (Ch. 363) are modeled after 'title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 200C)e, et seg.. The principles enunciated by the federal courts in cases involving that act are applicable in construing the Minnesota act. Danz v. Jones, 263 N.W.2d 395 (Marm. 1978). The ultimate burden of persuasion to establish an act of illegal discrimination rests at all times with the Complainant and involves a three-step process of pleading and proof. First, the Complainant must establish a prima facie case of discrimination. The Respondent must then rebut the prima facie case by articulating some legitimate, nondiscriminatory reason for the employment action and then the Plaintiff may show that the reasons proffered by the Respondent are a mere pretext for illegal dis-crimination. Hubbard v. United Press Intern., Inc., 330 N.W.2d 428, 441 n. 12 (Minn. 1983). In Hubbard, the Minnesota Supreme Court held that a discharged employee alleging racial discrimination establishes a prima facie case by showing (1) membership in a protected class, (2) qualifications for the job discharged from, (3) discharge, and (4) assignment of a non-member of the pro-tected class to do the same work. The complainant has not made a prima facie case under these standards. He, showed that 'he was a member of a protected racial class and that he was discharged. In addition, it is clear that he was qualified to perform the duties of his position. He had worked as a ware-houseman since October 17, 1974, and had received only one criticism of his job performance during one three-hour period during the course of his employ-ment. In Person v. J. S. Alberici Constr. Co., 25 FEP 399 (8th Cir. 1981), the Eight Circuit held that a black employee Who was discharged satisfied the qualification element of a prima facie case by providing evidence that he was not told of any work deficiency or that the employer action had anything to do with the alleged lack of qualifications. In this case, the one reminder Richardson received regarding his output during a particular three-hour

period, coupled with the fact that his discharge had nothing to do with his job performance, meets the Cbmplainant's burden of showing that he was qualified for the position involved. However, the Complainant did not establish tne fourth element of his Prima facie case as articulated in Hubbard: that the employer assigned a non-member of his class to do the same work.

In determining Whether the Complainant has established a prima facie showing of discrimination, it must be kept in mind that the purpose of the prima facie showing is to establish facts from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on an illegal criterion .Furnco Construction Corp. v. Waters, 438 U.S. 567, 17 FEP 1062 (1978). For thA reason, the Supreme Court held that the McDonnell-Douqlas formula for establishing a prima facie case is rot the exclusive means by which a prima facie showing of discrimination may to made, noting that it was not intended to be rigid, mechanized or ritualistic. Id.; see also, Williams v. trans-World Airlines, Inc. , 507 F.Supp 293, 27 FEP 243 (W.D. Mo. 1990), modified on other grounds, 660 F.23 1267 (8th Cir. 1981).

In addition to the elements of a prima facie case articulated in Hubbard, the courts have hell that a prima facie case of a discriminatory discharge can be made by showing that a protected class member was discharged from employment While persons not of that class, who committed acts of comparable seriousness, were not discharged. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); Turner v.. texas Instruments, Inc., 550 F.2d 1251, "15 FED 746 (5th Cir. 1977). In McDonald, the Supreme Court found a prima facie showing of a discriminatory discharge where workers of one race involved in the theft of cargo were discharged while a worker of a different race was not. In Turner, the Court held that the discharge of a black man and retention of a white man under apparently similar circumstances stated a prima facie case-1

In Green v. Armstrong Rubber Co., 22 FEP 125 (5th Cir. 1980), the Court held that a prima facie showing of discrimination is made if the charging party demonstrates Iny a preponderance of the evidence that he did not violate the work rule for Which he was discharged, or that if he did, a white employee who engaged in similar behavior was not similarly punished.

In this case, the Complainant has failed to establish, by a preponderance of the evidence, that he did not violate the work rules for which he was dis-chargel. He admitted that he left work early without seeking or obtaining authorization and did not punch his time card before leaving. It denied arranging with a co-employee to punch him out at midnight, but his denial, under the circumstances, did not persuasively establish that he did not do so. Punching out on the time clock was required by the Respondent and was an every-day routine for warehouse workers. It is unlikely that a long-term employee like Richardson would forget his duty to punch out or deviate from his routine practices. It is as likely as not that he chose not to punch out so that his unauthorized departure would go undetected. this alternative is fortified by the fact that some third party punched his time card for him and

no evidence was presented that it was punched by that third party in error or as a mere gratuity. therefore, the Hearing examiner finds that the evidene fails to establish the lack of prearrangement I,, a preponderance of tie evidence.

Furthermore, the Complainant failed to establish that Richardson was disciplined more harshly than other employees rot of his race for misbehavior of comparable seriousness. Ho attempted to make such a showing by offering evidence of the discipline imposed on Victorson when 'he punched out and left work five hours early without seeking authorization from his supervisor - by presenting evidence that on winter evenings one employee was permitted to leave work early in order to start other employees' cars and that employees' time card would be punched out by his co-workers at the end of the shift; and by offering evidence that discipline was frequently not imposed upon employees who improperly extended their lunches and their two 10"minute break periods.

"Similar circumstances" has usually been construed to mean those circumstances involving acts of "comparable seriousness". Sullivan v. Boorstin, 22 FEP 531, 535-36 (D.C. Cir. 1980).

However, none of those showings establish a prima facie case of discriminatory discharge.

In February, 1977, Victorson did leave work early without seeking or obtaining the approval of his supervisor and Victorson was not discharged but received only a written warning. That situation is similar only if it is assumed that Richardson's behavior is comparable. The Hearing Examiner is persuaded that no such comparability exists. First, Victorson punched out when he left work while Richardson did not. Second, Victorson persuaded his supervisors that he was, in fact, sick and compelled to leave work immediately, while Richardson established no compelling reason to leave work without seeking authorization as he did. Furthermore, while Sanders was Richardson's temporary supervisor at the time he left work, Sanders was not the one who ultimately determined what. disciplinary action would be appropriate. That determination was made by Victorson's usual supervisor and at a time when Halliwill was not employed by the Respondent. Moreover, Victorson's personnel file was not available for examination at the hearing. The fact that different supervisory personnel at a different time imposed different disciplinary measures upon employees suspected of different work rule violations, when tie respective personnel records of the two employees are not available for comparison, does not establish a prima facie showing of disparate treatment on the basis of race. Williams v. Trans-World Airlines, supra p. 299.

Likewise, the fact that the Respondent's supervisors condoned the practice of permitting one employee to leave early in the wintertime to start the cars of other employees does not establish disparate treatment an the basis of race because that particular practice was condoned and it was not shown that only white employees were permitted to do so. In fact, the tenor of Richiardson's testimony %as that even he, himself, had done that in the past. Simply because the employer permitted that particular practice as an exemption from its usual rules does not mean that the imposition of sanctions for other violations of the usual work rule are discriminatory.

The Respondent had not strictly enforced its rules regarding an emnployee's tardy return from lunches or breaks at various times prior to Ricliardson's discharge. However, that practice was changed on August 12, 1977, when Sanders instructed his crew of Halliwill's new policy that employees were not permitted to leave the warehouse during their break periods without super-visory approval and were required to punch out for lunch at a specified time and to punch in again at the end of their lunch break. Even though employees were not discharged for returning late from lunches and breaks prior to August 12, 1977 it is clear that such behavior was prohibited after August 12. The Respondent's prior practice does not, therefore, establish disparate treatment in Richardson's case, because it did not involve a tardy return from a lunch or break period, and occurred after August 12, 1977.

The Respondent's supervisors suspected that Richardson and another employee had an agreement whereby Richardson could "steal time" by having his card punched after he left work. Since Richardson was dischargd for "stealing time" it follows that they considered it to be serious and would be interested in identifying the other employee involved. That employee's participation in the "theft" would be of comparable seriousness. the other employee was rot

disciplined. Sanders had three suspects, but did not know which one, if any of them, had punched Richardson's time card.

Daryll Snell was the only black man at work after Richardson left. He was not one of the men Sanders suspected. Sanders named two suspects -- neither of whom was Snell. Sanders could not remember the name of the third suspect. However, Snell's name was mentioned when-Richardson testified, which was prior to Sander's testimony, and Sanders himself mentioned Snell's name in a dif- ferent context when 'he testified. If Snell was the third suspect, Sanders would most likely have remembered his name. This raises a reasonable inference that neither of the three men suspected of participating in the "theft" were black. Howeever, Out fact, standing alone, does not establish disparate treatment or the Corplainant's prima facie case. Where the identity of the employee commiting acts of comparable seriousness is unknown, even if all the suspects are of a different race, a prima facie case of disparate treatment fails unless it is shown that the Respondent failed to take some available steps to identify the particular person involved in the activity for which the Cnarging Party was discharged, or otherwise presents evidence tending to support an illegal racial motive. In this case, the Complainant offered no evidence of that kind or any other evidence tending to support a racial motivation for Richardson's discharge.

aon the evidence presented, it cannot be concluded that the discipline imposed on Richardson was different from the discipline imposed on other employees not of his class for instances of comparable seriousness or that it is more likely than not that the discipline imposed on Richardson was based on his race. The specific instances cited by the Cbmplainant simply are not com- parable and the evidence of the identity and investigation of the other employee suspected of punching Richardson's time card is inconclusive.

Thwever, even if it is assumed that prima facie showing of illegal dis- crimination vets made, the Respondent articulated a legitimate, non- discriminatory reason for Richardson's discharge which was not shown to Ibe a

mere pretext for discrimination.

Although an arbitrator found that Richardson's discharge was not for just cause within the meaning of the collective bargaining agreement then in effect, in cases alleging racial discrimination a review the merits of the employment action taken by the Respondent is not proper. The only legitimate question is Whether or not he was discriminated against on the basis of his race. Thus, in Williams v. Yazoo Valley-Minter City Oil Mill, 469 F.Supp. 37, 49 (N.D. Miss. 1978), the Court stated:

> whether or not the employer has good cause to terminate an employee is not an issue in a discrimination case. Even if the employee is discharged unnecessarily or in error, the employer is not guilty of racial discrimination unless the plaintiff proves that he was treated differently on account of his race from other employees with the same work history, committing the same type of infraction.

In this case, rightly or wrongly, Ficharason's,supervisors determined that he should be discharged. They knew he left work early without approval and without punching -out. Later, when Sanders discovered that Richardson's time card was punched at midnight and no employees' time cards were left unpunched, he concluded that Richardson had arranged to have another employee punch out

for him. That was a reasonable conclusion under the circumstances and in view of Richardson's failure to specifically deny such arrangements and his laughter when the Respondent's suspicion was discussed with him on August 30, even though it is possible that one of Richardson's co-workers knew that he left work early and punched him out as a gratuitous favor when he got to the time clock and noticed that Richardson -had not punched himself out or that another employee punched him out in error and did not choose to report it.

The Complainant suggested that Sanders, a black man, may himself have punched Richardson's time card in an effort to set him up or that he was otherwise untruthful about the events on august 26. The Hearing Examiner is not persuaded that Sanders punched the time card or that his recollection of the events is not worthy of belief. Indeed, it seems 'highly likely that Sanders, upon observing Richardson leaving the premises, would immediately look at his time card to see if he was punched out If he was not punched out, it seems likely, as Sanders testified, that he would look for Richardson in the plant to see if he had returned and that he would call the guard shack when he was unable to find him to see if Richardson had left. Upon being advised by the guard that he bad left in his automobile, it seems likely that Sanders would then wait I,, the time clock to see if Richardson would return and punch out. When he did not do so, and when Sanders discovered that his time card was punched, it was not unreasonable for him to have concluded that someone punched out for him by prearrangement, although it is true that it could have been punched by mistake or as a gratuity. Sanders' version of the events, even though some of 'his testimony was not included in the report he made in 1977, was logical, persuasive Earl credible. Therefore, it is con-dudled that the Employerc articulated c legitimate, nondiscriminatory reason for Ridhardson's discharge; namely, his departure from work without authori-zation and his suspected arrangement with some other employee to punch him out.

Although Sanders and Halliwell did not know the identity of the person who punched Richardson's time card and only assumed that it was done by prearrangement, the Hearing Examiner is persuaded that their assumption and belief was genuine and not a mere pretext for discharging Richardson because of Ids race. It is not discriminatory to discharge an employee simply because the employer cannot prove its suspicions and there is no evidence that the employer had not discharged other employees suspected of violating company rules, even when they could not prove it.

Complainant argued that the real reason for Fichardson's discharge resulted from his union activism and the grievances he had filed during the week prior to his discharge. Of course, a discharge on that grounds would not Tx? authorized under the collective bargaining agreement. However, even if true, it would not relate to Richardlson's race, but to the fact. that he rankled his supervisors and they decided to get rid of 'him. Such a decision was not shown to result in disparate treatment.

Cbnsequently, on the basis of the evidence presented, it is concluded that Richardson was not discharged because of 'his race, and that 'his Complaint should be dismissed.

J.L.L.